IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No. 73 of 2000.

Judgment reserved on:23.10.2007

Date of Decision: November 20, 2007

Smt. Darshana Aggarwal … Petitioner

Versus

The Tax Recovery Officer & ors. … Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K.Ahuja, Judge

Whether approved for reporting? Yes

For the Petitioner : M/s Rajesh Garg and Dushyant Dadhwal, Advocates.

For the Respondent(s) : Ms. Vandana Kuthiala, Advocate.

Deepak Gupta, J

The short question which arises for decision in this writ petition is whether the Tax Recovery Officer while exercising powers under Rule 11 of the Second Schedule to the Income Tax Act, 1961 (hereinafter referred to as the Act), is entitled to determine the question whether a sale transaction made in favour of the petitioner is a Benami transaction or not?

The facts necessary for decision of the case are that on 14.2.1992 the house of the petitioner was searched by the Income Tax authorities and cash amounting to Rs. 1,56,875/- was seized.

The petitioner thereafter filed a return showing the income of Rs.30,600/- for the relevant year. An amount of Rs. 1,56,875/- being the amount seized was added to the income of the petitioner on protective basis. According to the revenue, Shyam Sunder Aggarwal husband of the petitioner had alleged in his statement that this amount belongs to his wife. However, later, it was found that the petitioner is only a housewife, having no independent source of income and this amount of Rs.156,875/- was deleted from the income of the petitioner and added to the income of her husband Shyam Sunder Aggarwal. On the basis of such assessment made, according to the revenue, an amount of Rs.43,89,705/- was recoverable from Shyam Sunder Aggarwal husband of the petitioner. Interest was also payable on this amount in terms of Section 220(2) of the Act. At the time of the filing of the reply to the writ petition, this amount had swelled to Rs.84,86,942/-.

A notice of attachment under rule 48 of the Second Schedule of the Act was issued to the petitioner by the Tax Recovery officer (hereinafter referred to as the TRO) on 10.10.1996 to the effect that her husband Shyam Sunder Aggarwal (defaulter) had failed to pay Rs.43,93,194/- and the interest thereon. It was ordered that the two properties, namely, house Nos. 183, 183A, 183B, 183C, 183D and house Nos 160, 160A and 160B at Kasauli were attached and the petitioner was restrained till further orders from transferring the said properties in terms of Section 222(1) of the Act.

These properties in the revenue record stand in the name of the petitioner Smt. Darshana Aggarwal, wife of the defaulter Shyam Sunder Aggarwal. The property comprising of house Nos. 183, 183A to 183D is a three storeyed building which was purchased by the petitioner on 16.8.1985 from S/Shri Jagdish Chander, Harish Chander, Ramesh Chander and Smt Rampati Gupta for a sum of Rs. 30,000/- vide sale deed , copy of which has been filed as Annexure PC to the writ petition. The property forming house Nos. 160, 160A and 160B was purchased by the petitioner in a public auction which was confirmed by the Chief Judicial Magistrate, Solan for a sum of Rs. 22,110/- and mutation thereof has been sanctioned in the name of the petitioner.

After receipt of the notice, it appears that the petitioner did not take any action and therefore, the TRO issued another notice to her under Rule 53 for settling the terms of the sale proclamation. This notice was issued on 14.12.1999. In response to this notice, the petitioner sent a letter to the TRO on 28.12.1999 stating that she is willing to deposit any tax which may be payable by her. According to her, the properties mentioned in this notice belong to her and she is the absolute owner of the same and cannot be attached for payment of any tax payable by any other person. She sent another letter on 7.1.2000 to the similar effect. In this letter, it was also alleged that her husband Shyam Sunder Aggarwal has nothing to do with any of these properties. The TRO thereafter issued another notice under Rule 83 to the petitioner to produce evidence in support of the contention raised by her in her letter dated 7.1.2000 and to establish that provisions of Section

222(1) of the Act are not attracted to the facts of the case. He directed the petitioner to be present on 18.1.2000. Again on 10.1.2000, the TRO sent another letter to the petitioner asking her to produce documents including year-wise source of income for the last ten years to establish her claim. It appears that the petitioner led no evidence before the TRO and the TRO on the basis of the material placed before him, came to the conclusion that the petitioner has no independent source of income as she was simply a housewife. The TRO came to the conclusion that the properties were purchased by her husband out of his funds but in the name of his wife. The TRO further held that the provisions of explanation to sub-section (1) of Section 222 of the Act were duly attracted as the properties were enjoyed by Shyam Sunder Aggarwal and his family for residential purposes. Thereafter the proclamation of sale was drawn up on 9.2.2000 and these are under challenge in this writ petition.

The main ground of challenge is that the TRO has no right or jurisdiction to determine the question whether the properties were held Benami by the petitioner for her husband. It is alleged that the only option open to the petitioner is to establish her claim in a Civil Court.

On behalf of the respondents, it is alleged that the writ petition is not maintainable and the petitioner has an alternative efficacious remedy of filing an appeal. The petitioner can also file a suit to establish her claim. It is, further alleged that the petitioner never objected to the attachment when it was made and only raised objections when proclamation of sale was to be drawn up

and even though she was given an opportunity, she led no evidence and none appeared on her behalf and, therefore, the petition deserves dismissal. It is contended that the orders have been passed strictly in terms of Section 222 of the Act. The TRO under Rule 11 to the 2nd schedule has the right to determine all such questions.

To appreciate the oral contentions of the parties, it would be appropriate to make reference to certain provisions of the Income Tax Act and Rules.

Section 222 of the Act reads as follows:-

" **Certificate to Tax Recovery Officer.**

222. [(1) When an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may draw up under his signature a statement in the prescribed form specifying the amount of arrears due from the assessee (such statement being hereafter in this Chapter and in the Second Schedule referred to as "certificate") and shall proceed to recover from such assessee the amount specified in the certificate by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule ---]

(a) attachment and sale of the assessee's movable property;

(b) attachment and sale of the assessee's immovable property;

(c) arrest of the assessee and his detention in prison;

(d) appointing a receiver for the management of the assessee's movable and immovable properties.

[*Explanation* - For the purposes of this sub-section, the assessee's movable or immovable property shall include any property which has been transferred, directly or indirectly on or after the 1st day of June, 1973, by the assessee to his spouse or minor child or son's wife or son's child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's child, as the case may be, continue to be included in the assessee's movable or immovable property for recovering any arrears due from the assessee in respect of any period prior or to such date.

(2) The Tax Recovery Officer may take action under sub-section(1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

A perusal of the section itself shows that when an assessee is in default, the TRO shall proceed to recover from the assessee the amount specified in the certificate by attachment and sale of the assessee's property or by arresting him or detaining him or detaining him in person. The explanation to this section further provides that for the purpose of this sub-section, the assessee's movable or immovable property shall include any property which has been transferred directly or indirectly on or after the 1st day of June, 1973, by the assessee in favour of his relatives specified therein and stands in their names.

Rule 11 of the Second Schedule reads as follows:-

"Investigation by Tax Recovery Officer.

11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that----

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

Reliance on behalf of the respondents has been placed on sub-rule 3 , where the onus is on the objector to adduce evidence that he has some interest or was possessed of the property in question. Reliance has also been placed on sub rule 5 wherein if the TRO is specified that the property was in the possession of the defaulter as his own property or was in the possession of some other person in interest or in the possession of the defaulter, the TRO shall disallow the claim. Sub-rule 6 provides that an aggrieved party can file a suit to establish his /her claim despite the order of the TRO.

Reference may also be made to section 281 of the Act which provides that where during the pendency of any proceeding under the Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee encumbers or transfer his property by creating a charge thereon, such charge or transfer shall be void as against any claim in respect of any tax payable by the assessee.

The provisions of Rule 48 of the Second Schedule to the Act, reads as follows:-

"Attachment.

> 48. Attachment of the immovable property of the defaulter shall be made by an order prohibiting the defaulter from transferring or charging the property in any way and prohibiting all persons from taking any benefit under such transfer or charge."

Reliance on behalf of the petitioner is placed on the judgment of the apex Court in **Tax Recovery Officer II, Sadar Nagpur** v. **Gangadhar Vishwanath Randade,** (1998) 6 SCC 658. In that case, the assessment against the assessee was finalized on 7.8.1967. On 21.10.1972, the TRO issued notice under rule 11 of the Second Schedule to the Act and on 23.10.1972 attached a residential house of the assessee. Objections were filed by the assessee, his wife and daughter that on 27.2.1969, the assessee had executed a trust deed in respect of the said house in favour of his wife and daughter and that on 27.2.1969, he had , by a registered deed, conveyed that property to them. On this basis, it was alleged that on the date of issuance of notice under Rule 2, the assessee's wife and daughter had become full owners and were in possession of the property. The ITO issued notice under

Section 281 and on 9.5.1974 issued an order declaring that the transfer of the said property was void under Section 281. The TRO over-ruled the objections filed by the objectors and held the conveyance of the property in their favour to be illegal and void .

The question before the apex Court was whether in proceedings under Rule 11 of the Second Schedule to the Income Tax Act, the TRO could have declared such transfer as void under Section 281. The Court held as follows:-

> "9. The Tax Recovery officer, therefore, has to examine who is in possession of the property and in what capacity. He can only attach property in possession of the assessee in his own right, or in possession of a tenant or a third party on behalf of / for the benefit of the assessee. He cannot declare any transfer made by the assessee in favour of a third party as void. If the Department finds that a property of the assessee is transferred by him to a third party with the intention to defraud the Revenue, it will have to file a suit under Rule 11(6) to have the transfer declared void under Section 281.
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> 13. In the present case, the Tax Recovery Officer could not have examined whether the transfer was void under Section 281 of the Income Tax Act. His adjudication of the transfer as void under Section 281 is without jurisdiction. The Tax Recovery Officer has relied upon the earlier order of the Income Tax Officer dated 9.5.1974 declaring that the transaction is void under Section 281 of the Income Tax Act. In the earlier proceedings, however, although the High Court has not set aside this order of the Income Tax Officer, the High Court has expressly held that the order amounted only to an intention or declaration on the part of the Department to treat the transaction as void under Section 281. Such a declaration cannot affect the legal rights of the parties affected under Rule 11. The High Court expressly held that the rights of the parties under Rule 11 were not affected in any way by this declaration. The Department, therefore, cannot proceed on the assumption that the transaction is void under Section 281, nor can the Tax Recovery Officer, while proceeding under rule 11, declare a transaction of transfer as void under Section 281 by relying on the order of 9.5.1974 or otherwise. His jurisdiction relates to examining possession, and only incidentally,

> any question of right to possession as claimed by the objector. The High Court has, therefore, rightly set aside the order of the Tax Recovery Officer."

On the strength of the aforesaid judgment, it is contended by the learned counsel for the petitioner that the orders of the TRO in the present case are also void.

On the other hand, on behalf of the revenue, reliance has been placed upon a decision of a Division Bench of the Madras High Court in **Iqbal Begum and others** v. **Tax Recovery Officer and others,** (1974) 97 ITR 310**,** wherein the Court held that Rule 11 impliedly authorizes the TRO to attach or sell property held by a third party-benami for the defaulter.

The revenue has also placed reliance on a Division Bench judgment of the Madhya Pradesh High Court in **Arya Confectionery Works v. Commissioner of Income Tax, M.P** [1983] 143 ITR 814, wherein the Division Bench held as follows:-

> "With regard to a finding of the Tribunal on the question of Benami business, the following principles are well settled:
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> (a) The burden of proof regarding benami is upon one who alleges benami.
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> (b) To prove benami the most important point is to examine the source of consideration and along with that there are certain other criteria which could be taken into account.
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> (c) A finding regarding benami is a finding of fact.
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> (d) A finding of fact cannot be questioned in the reference proceedings unless it is:
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> (i) Without any evidence in support of it, or
>
> (ii) Is perverse in the sense that "no person acting judicially and properly instructed as to the relevant law" would reasonably come to such a finding."

We are of the considered view that this judgment in fact does not help the revenue to favour the assessee. This judgment

clearly lays down that the burden of proof regarding benami is upon the person who alleges that the transaction is benami. In this case, it is the department which has alleged that the transaction is benami. Therefore, it is obvious that it is for the department to prove this fact. It is also obvious that under the provisions of rule 42 of the Second Schedule to the Act quoted above, the TRO is also authorized to attach the property of the defaulter. The defaulter in this case was Shyam Sunder Aggarwal and not the petitioner. The Kerala High Court in **P.K.Kunjamma** v. **Tax Recovery Officer,** [1997] 227 ITR 852 also dealt with a case where the property of the wife was attached to realize the tax dues of her husband. The court struck down the attachment of the property.

In view of the law laid down by the apex Court in **Gangadhar Vishwanath Ranade's** case (supra), the judgment of the Madras High Court in **Iqbal Begum's** case (*supra*) can no longer be treated as good law. In fact, the case of the petitioner stands on a better footing than the case of the appellant before the apex Court. In the case before the apex Court, the transaction was apparently void in terms of Section 281 of the Act. The transfer had been made after the assessment had been finalized by the assessee in favour of his wife and daughter. Any transaction made in violation of the terms of Section 281 was void. Despite this, the apex Court held that the TRO had no jurisdiction to declare the transaction void and the only remedy was to file a civil suit. It held that the department could not proceed on the assumption that the transaction is void under Section 281 nor can the TRO while proceeding under Section 11, declare a transaction

of transfer as void under Section 281. His jurisdiction relates to examining possession, and only incidentally, any question of right to possession as claimed by the objector.

Section 222 of the Act authorizes the TRO to issue a certificate in respect of an assessee who is in default. It further authorizes the TRO to proceed to recover the amount from the assessee in default by attachment of the assessee's property both movable and immovable or by appointment of receiver of his properties or by arrest or detention of the assessee. The power under Section 222 is limited to the properties of the assessee. Rules must be read in the context of the main enactment. Rule 48 as noted above permits the attachment of the immovable property of the defaulter. It is obvious that the powers of the TRO relate to the property of an assessee in default.

A bare reading of Rule 11 especially sub-rules 3 and 4 may give an impression that the TRO has the right to declare a property which is not in the name of the assessee to be his. However, when read in the context of Section 222 and Rule 48, it appears to us that Rule 11 will apply only to properties ostensibly and apparently owned by the assessee in default. For example, if any property is in the name of the assessee in default, and a third party claims that the assessee is not the true owner thereof then it is for the third party to prove this and the TRO shall have the right to investigate the claim or objections in terms of Rule 11. However, we are of the considered view that if the property is ostensibly and apparently in the name of third party, then if the income tax authorities claim that the said property is actually possessed or owned by the

assessee in default, they shall have to establish their claim in a Civil Court.

In the present case, the property stands in the name of the petitioner. She has placed material to evidence the fact that it was she who had purchased the property. If the department disputes that she had no funds to purchase the property and the property must have been purchased by her husband, the department can take appropriate action. The petitioner has alleged that the property belongs to her. In case the department wants the petitioner to prove the source of funds for purchase of these properties, it can take recourse to the provisions of the Act. If the department insists that the petitioner is holding the property benami for her husband, the department must establish this by filing a civil suit.

In view of the above discussion, we are of he considered view that the order of attachment and the order of proclamation of sale issued by the TRO is wholly without jurisdiction. Since the order is wholly without jurisdiction, there is no question of dismissing the petition on the plea that an alternative remedy is available. The writ petition is accordingly allowed and the orders Annexure- PK and Annexure-PL are quashed being wholly without jurisdiction. However, right of the department to get a declaration that the petition is holding property for her husband cannot be taken away. The department shall have the right to file a civil suit in this regard. The time spent from 10.10.1096 till the disposal of the writ petition, in proceedings which were being bonafide prosecuted by the department, shall be excluded in

computing the limitation. We further direct that the petitioner shall not in any manner alienate, transfer or encumber any two of the properties mentioned above for a period of three months from today so that the department may approach the Civil Court during this period and obtain suitable interim direction from the civil Court. In case an application for interim relief is filed by the department, the civil court shall decide the same strictly on its own merit being totally uninfluenced by the observations made in the present writ petition. The writ petition is disposed of in the aforesaid terms. No order as to costs.

(Deepak Gupta),J.

November 20, 2007 (V.K.Ahuja),J.

s.